Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	
DISTRIBUTION OF CABLE ROYALTY FUNDS	)	**NO. 14-CRB-0010-CD (2010-13)**
In re	)	
DISTRIBUTION OF SATELLITE ROYALTY FUNDS	)	**NO. 14-CRB-0011-SD (2010-13)**

RESPONSIVE BRIEF OF
THE JOINT SPORTS CLAIMANTS

Pursuant to the Copyright Royalty Judges' ("Judges") Orders Denying Motion for Clarification and Motion to Quash, Suspending Case Schedule and Requiring Further Briefing Regarding Discovery (April 12 and 13, 2016) ("April Orders"), the Joint Sports Claimants ("JSC") submit this brief in response to the MPAA Further Briefing Regarding Discovery (April 29, 2016) ("MPAA Br.").

INTRODUCTION AND SUMMARY

The April Orders direct all parties to address specific issues raised by MPAA's discovery requests, which seek information establishing the "eligibility of all participants to receive a share of royalties in this proceeding . . . ." MPAA Br. at 4. The core issue is whether the Judges should reconsider longstanding precedent that MPAA urged the Copyright Royalty Tribunal ("CRT") to adopt. That precedent is the "Unclaimed Funds Ruling" under which royalties are allocated among the various program categories by valuing all programming, not merely validly claimed programming, in each category. *See* JSC Reply at 1-3 (March 31, 2016). The Judges

and their predecessors have consistently followed the Unclaimed Funds Ruling for more than three decades. There is no proper basis for reconsidering that Ruling in this proceeding.

RESPONSE TO THE JUDGES' QUESTIONS

a. Relevancy of MPAA Discovery Requests. Under the Unclaimed Funds Ruling, the share of royalties allocated to the Program Suppliers category that MPAA represents does not vary based upon the validity of claims in other program categories. Thus, MPAA's discovery requests, insofar as they seek information concerning the validity of claims in other categories, are irrelevant for purposes of royalty allocation. MPAA may pursue such discovery only from those parties who assert a claim against the Program Suppliers category.

b. Role of Precedent. (i) The discoverability of the information requested by MPAA is dependent upon whether the Judges follow the Unclaimed Funds Ruling. (ii) That Ruling is precedent binding upon the Judges.

c. Adherence to Precedent. The Judges should not reconsider the Unclaimed Funds Ruling because it is consistent with and furthers the legislative purposes underlying the compulsory licenses and the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 ("2004 Act"). Furthermore, due process precludes the Judges from reconsidering the Ruling in this proceeding.

d. Nature of MPAA Discovery Requests. On their face, MPAA's discovery requests (MPAA Br., Ex. A) are not oppressive, unduly burdensome or disproportionately expensive as to members of a category in which claims disputes exist. However, JSC and MPAA disagree as to the proper meaning and scope of these requests. The Judges should resolve such disagreements, as well as the related issues of burden and costs, only where necessary in response to specific motions to compel and not in connection with the April Orders.

e. Rebuttable Presumption. The Judges should employ a rebuttable presumption of claims validity and claimant authority in determining the permissibility and scope of discovery. *See Ruling and Order Regarding Claims*, Docket No. 2008-1 CRB CD 98-99 (Phase II), at 13 (June 18, 2014) ("2014 Claims Ruing"). Given its past conduct, the Independent Producers Group (now calling itself "Multi-Group Claimants") ("IPG") should not be entitled to that presumption. *See Memorandum Opinion and Ruling On Validity and Categorization of Claims,* Docket Nos. 2012-6 CRB CD 2004-09 (Phase II) *et al.*, at 9-10 (Mar. 13, 2015) ("2015 Claims Ruling").

ARGUMENT

In the first cable royalty distribution proceeding, MPAA urged the CRT to "establish each category's share to the cable royalty fund on the basis that they all represent 100% of eligible claimants." *See* Brief of the MPAA, Its Member Companies, and Certain Other Program

Producers and Distributors on the Issue of Categories of Claimants Not Fully Represented in CRT Doc. No. 79-1 at 6 (May 23, 1980) (Exhibit A) ("MPAA Unclaimed Funds Br."); MPAA Opposition to Motion to Strike in CRT Doc. No. 79-1 at 2-3 (July 9, 1980) (Exhibit B). As MPAA explained, that approach "is reasonable and appropriate because it permits the allocation among categories to be made in a relatively straightforward manner which lends itself to continuing application." MPAA Unclaimed Funds Br. at 6. The CRT adopted MPAA's proposed approach, ruling that "royalty fees will be allocated to categories of claimants as if all eligible claimants in each category had filed valid claims." *1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980) ("1978 Final Determination"). While the CRT noted that its Unclaimed Funds Ruling might not control future proceedings (*id.*), neither the CRT nor any successor body has ever adopted a different approach.

I. The Unclaimed Funds Ruling Is Binding Precedent.

The Judges have a "statutory obligation to follow precedent established by prior determinations . . . ." *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 140 (D.C. Cir. 2015). Section 803(a)(1) of the Copyright Act, 17 U.S.C. § 803(a)(1), requires the Judges to "act on the basis of . . . prior determinations and interpretations" of the CRT, Librarian of Congress, Register of Copyrights, copyright arbitration royalty panels ("CARP") and the Judges, and decisions of the court of appeals. Section 803(a)(1) reflects a Congressional concern with ensuring that royalty distribution determinations not become "unpredictable and inconsistent." H.R. Rep. No. 108-408 at 18 (2004) ("2004 House Report"). While prior rulings are "not necessarily controlling," they have "precedential value" and must be followed unless "distinguished." *Id.* at 27. Consistent with Section 803(a)(1), the Judges have "identified" and relied upon the "basic principles from the[] earlier proceedings." *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, 64986 (Oct. 30, 2013) ("2000-03

Phase II Determination"); *see Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015) ("1998-99 Phase II Determination").

MPAA contends that the Unclaimed Funds Ruling falls outside Section 803(a)(1) because the CRT once said that this ruling "'may not necessarily control'" future proceedings. MPAA Br. at 9, *quoting* 1978 Final Determination, 45 Fed. Reg. at 63042. But that ruling has in fact "control[led]" *all* cable royalty distribution proceedings conducted to date, over a period of more than three decades. The fact that MPAA and others stipulated in two of several distribution proceedings that the CARP and Judges should adhere to the Unclaimed Funds Ruling does not mean that ruling lacks precedential value. *See* MPAA Br. at 9-10. Indeed, those stipulations expressly state that the "'unclaimed funds' issue . . . ***was resolved*** by the Tribunal in the course of its 1978 proceeding." MPAA Br., Ex. C at 3 (emphasis added); *id.* Ex. D at 4 (emphasis added).

It also is irrelevant whether MPAA has agreed to the Unclaimed Funds Ruling in this proceeding. MPAA Br. 10. That ruling remains precedent regardless of whether MPAA agrees with it. Furthermore, as noted above, MPAA was the party that successfully urged the CRT to adopt the Unclaimed Funds Ruling. The doctrine of judicial estoppel thus precludes MPAA from changing its position and urging the Judges to reject that ruling. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (estoppel is appropriate where party's position is inconsistent with earlier position, party had persuaded a court or agency to accept its earlier position, and party would derive an unfair advantage if not estopped); *U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 608 F.3d 871, 890 (D.C. Cir. 2010) ("if a party successfully assumes a certain legal position in one proceeding, 'he may not thereafter, simply because his interests have changed, assume a contrary position.'") (citation omitted).

In any event, MPAA has agreed with all other parties that the Judges should allocate royalties among the different *categories of programs* and should employ the same *program category definitions* used in past proceedings. *See* Joint Comments of 2010-13 Cable Participants on Phase I Claimant Category Definitions at 1-2 & n.1 (Oct. 9, 2015) ("2010-13 Joint Comments"). The Judges accepted that stipulation, concluding that they would allocate royalties among these "Agreed Categories." *Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and Scheduling Order*, No. 14-CRB-0010-CD (2010-13) at 1 (Nov. 25, 2015) ("Nov. 25 Scheduling Order"). MPAA cannot properly urge the Judges to change course and allocate royalties to *categories of specific claimants* rather than *categories of programs.* There is no reason to have Agreed Categories of programs if the Judges' only function is to award royalties to different groups of claimants, each of which could represent any number of claimants for any types of programming.

II. The Unclaimed Funds Ruling Is Consistent With And Furthers The Purposes Of The Copyright Act.

A key Congressional objective in adopting compulsory licensing was to minimize transaction costs while ensuring fair compensation to copyright owners. *See National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 911 (D.C. Cir. 1998); 1998-99 Phase II Determination, 80 Fed. Reg. at 13428; Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 32 (Aug. 1, 1997). Concerns over the cost of compulsory licensing royalty proceedings also supported Congress's decision to eliminate the CARP process in favor of adjudication by the Judges. *See* 2004 House Report at 29, 30, 32, 99, 100 and 119.

MPAA's suggestion that reconsidering the Unclaimed Funds Ruling would streamline the proceedings and minimize costs (MPAA Br. 2) has it exactly backwards. A global claims

proceeding over every claimant and program title, as MPAA contemplates, would be far more expensive and time consuming than the longstanding procedure in which allocation among the programming categories precedes the resolution of any discrete disputes within a category. If, as MPAA now urges, the Judges make the allocation determination on the basis of aggregated claims, it would be necessary for each party to scrutinize and evaluate potential challenges to hundreds of claimants and thousands of programs in categories outside the one category it represents. In contrast, experience shows that in several categories there will be no distribution disputes; even in categories where disputes have arisen, they have involved only a relatively small subset of claims. Thus, resolving the allocation among categories separately from and prior to addressing the distributions within each category is by far the more efficient approach and helps minimize overall transaction costs. *See* Joint Reply to MPAA Opposition to Joint Motion to Confirm of Clarify Order for Further Proceedings at 3-6 (March 31, 2016).

MPAA also complains about the delays in "final distributions" of royalties to MPAA if the Judges adhere to precedent. MPAA Br. at 7. However, under MPAA's proposed "new system" (*id.* at 10), final distributions of 2010-13 royalties to all parties – not simply those with intra-category disputes – would be delayed for years longer than under the current system. Currently more than $547 million in 2010-13 cable and satellite royalties remain to be distributed. Under MPAA's approach, *all* of those royalties would remain in controversy until there is a final distribution determination no longer subject to judicial review.

Moreover, "the policy of the Copyright Act [is] to promote settlements." *Order Granting Phase I Claimants' Motion for Partial Distribution of 2004 and 2005 Cable Royalty Funds*, No. 2007-03 CRB CD 2004–2005, at 3 (Apr. 10, 2008); *see also Independent Producers Group*, 759 F.3d at 102 (Judges' functions include "encourag[ing] settlements"). Section 803(a)(1) stems in

part from the recognition that the parties require "reliable precedent upon which [they] can base the settlement of their differences." *Hearing on H.R. 1417 Before the Subcomm. on the Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 5, 7 (2003) (statement of Marybeth Peters, Register of Copyrights). That is plainly the case with the Unclaimed Funds Ruling. Indeed, MPAA originally argued that the Unclaimed Funds Ruling would promote settlement, explaining that if each category is "assumed to represent fully all eligible claimants for purposes of determining the allocable shares for all groups of claimants" the resulting allocation "will provide a better guide for future determinations on distribution shares." MPAA Unclaimed Funds Br. at 6.

The procedure MPAA now proposes would deter the very sort of intra-category resolutions that have sharply narrowed prior proceedings. The court of appeals rejected the argument that where any party "chooses not to settle with the other claimants, all awards [sh]ould thereby be in controversy and a full hearing on all claims would be required." *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 939 (D.C. Cir. 1985). In doing so, the court explained that such a rule "would effectively eliminate the likelihood for settlements . . . . Past history suggests that at least one claimant will in any given proceeding feel sufficiently aggrieved to upset the settlement apple cart." *Id.* Accepting MPAA's position that any party should be permitted to attack any claim in any category would erect the same type of barrier to settlement in this proceeding.

Nor is there any merit to MPAA's suggestion that the burdens of its "new system" (MPAA Br. at 10) are somehow required by statute and necessary to mitigate fraud. *Id.* at 6-8. JSC agree that royalties may be distributed only to parties having valid claims. *See* 17 U.S.C. §§ 111(d)(3) & (4)(A); *id.* § 119(b)(3). But the CRT effectively determined that this statutory

requirement does not preclude the Unclaimed Funds Ruling; indeed, the CRT and its successors have authorized the distribution of billions of dollars in compulsory licensing royalties following the Unclaimed Funds Ruling. Consistent with this ruling, the Judges would continue to allocate to each *category* the full value of all potential eligible claims in it, but would distribute royalties only to *claimants* with a valid claim in that category. The valid claimants in each category already have every incentive to, and do, police their category for invalid claims.

More fundamentally, as MPAA itself observed in advocating for the Unclaimed Funds Ruling, it is more equitable to accord the value of any unclaimed programming to "those most closely identified with the type of programming generating compulsory license fees" rather than to unrelated categories of programming. MPAA Unclaimed Funds Br. at 7. As MPAA implicitly recognized, there is no logical reason to allow the producers of the many infomercials for which MPAA claims royalties to share in, for example, the value of programming within the Sports category.

III. Reconsidering The Unclaimed Funds Ruling At This Stage Of The Proceedings Would Violate Due Process.

MPAA argues that the Unclaimed Funds Ruling has become an outdated "artifact of the historical Phase I/Phase II bifurcation." MPAA Br. at 4. MPAA is wrong because the Judges have not said that they would no longer make separate allocation determinations (Phase I) and distribution determinations (Phase II) within this proceeding; they said only that they would make these determinations in a single proceeding rather than in separate proceedings. *See* Nov. 25 Scheduling Order at 3. If MPAA were correct, such a fundamental change would pose serious due process issues because no party (not even MPAA) had even suggested eliminating the longstanding Phase I/Phase II bifurcation of issues. As the Judges have correctly noted, "Affirmative action by the Judges without a request for action is unwarranted and could be

contrary to principles of due process." 2000-03 Phase II Determination, 78 Fed. Reg. at 64987 n.13 (Oct. 20, 2013).

An additional due process issue arises from the fact that the parties necessarily rely on the prior body of legal determinations in preparing their studies and evidence in these proceedings – a lengthy, multi-year process. As MPAA acknowledged in joining with JSC and other parties to support the continued application of the categories long used to allocate royalties, the parties perforce prepare their evidentiary cases on the basis of the prior rulings and determinations by the Judges and their predecessors:

> [The categories] are the product of years of experience in these proceedings, as well as prior rulings of the Copyright Royalty Tribunal determining the proper categorization of various programs and types of programs, and prior determinations of a Copyright Arbitration Royalty Panel, the Copyright Office, and the Court of Appeals. ***In accordance with these prior determinations and interpretations, the 2010-13 Cable Participants already have relied upon the existing categories and definitions in preparing their evidentiary cases*** for both the negotiation and litigation of the 2010-13 cable royalty distribution proceeding. ***Those cases include contemporaneous surveys, already conducted, that cannot be redone*** to reflect new and different program categories and definitions.

2010-13 Joint Comments at 1-2 (emphases added, footnotes omitted). Notably, the first and foremost of the "prior rulings of the Copyright Royalty Tribunal" cited by MPAA and the other parties was the 1978 Final Determination, where the CRT adopted the Unclaimed Funds Ruling. *See* 2010-13 Joint Comments at 2 n.1.

Given that preparation of the parties' studies and evidence begins years in advance of a contested proceeding – and because JSC (and other parties) have prepared for these proceedings in reliance on the Unclaimed Funds Ruling – it would be fundamentally unfair to make a radical change in the applicable legal standard at this late stage. Doing so also would pose serious due process issues. *See, e.g., Program Suppliers*, 409 F.3d at 402 ("due process may require that

parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard") (citing *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981)). "Normally, an agency must adhere to its precedents in adjudicating cases before it," and even where the statutory scheme allows for some deviation from precedent doing so is permissible only "so long as . . . the affected parties have not detrimentally relied on the established legal regime." *Consol. Edison Co. of New York, Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003); *see also Woodward v. Dep. of Justice*, 598 F.3d 1311, 1315 (Fed. Cir. 2010) (agency erred in applying new standard to adjudication "where claimants made strategic decisions in reliance on the old standard, before the new standard existed"). Here, JSC and other parties have prepared their cases in reliance on precedent that has been followed consistently for over thirty years, and it is well settled that "the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082-83 (D.C. Cir. 1987).

Such fairness and due process concerns are particularly acute in these proceedings. In asking the Judges to discard the Unclaimed Funds Ruling, MPAA apparently seeks to tilt the table in favor of its preferred type of study – a Nielsen-based viewing study – and against the JSC's survey evidence, known as the Bortz study. MPAA's study uses viewing data at the level of individual programs. In contrast, the Bortz study consistently relied upon by JSC (and other parties) surveys cable operators about their valuations of various types of programming during the years at issue; it thus looks to categories of programming as a whole, not individual programs, consistent with the Unclaimed Funds Ruling.

The Judges and CARPs have found "the Bortz study to be the most persuasive piece of evidence provided on relative value" of the heterogeneous categories of programming in these

proceedings. *See 2004-2005 Phase I Order*, 75 Fed. Reg. at 57066. That conclusion has been endorsed by the Librarian and affirmed by the D.C. Circuit. *See Distribution of 1998 and 1999 Cable Royalty Funds*, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004) (finding "the Bortz survey best projected the value of broadcast programming in the hypothetical marketplace"); *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005) (approving reliance on Bortz).

In sharp contrast, MPAA's Nielsen studies have been found less probative of the relative market value of the various categories of programming than the Bortz study. *See, e.g., Librarian's Order adopting 1998-1999 CARP Phase I Report*, 69 Fed. Reg. at 3613 ("After considering both the Bortz survey and the Nielsen study, the Panel concluded that the Bortz survey best measured the value of programming."); *id.* at 3615 (finding "Nielsen is less persuasive than Bortz"). The Judges should not countenance MPAA's attempt to obtain a perceived advantage for its favored type of study through an eleventh hour change in long-settled precedent. Doing so here would be particularly unfair, where the evidence MPAA seeks to marginalize consistently has been found to be highly probative on the central issue of relative value.

While the Judges have found viewing-based studies "to be an acceptable approach to help determine relative market value of television programs ***within a single, homogeneous program category***" – *Order Reopening Record and Scheduling Further Proc eedings*, Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (May 4, 2016) (emphasis added) – the Bortz study has been found the superior methodology for allocating relative value ***among*** the heterogeneous categories of programming. *See also Independent Producers Group*, 792 F.3d

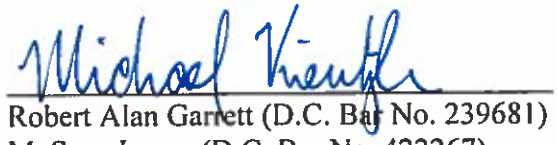
at 142 (affirming the Judges' reliance on viewership data in a Phase II proceeding while noting that "different considerations apply in Phase I and Phase II proceedings").

CONCLUSION

For the reasons discussed above, the Judges should adhere to the Unclaimed Funds Ruling. In conducting further proceedings, the Judges should first determine each program category's share of the royalty funds "on the basis that they all represent 100% of eligible claimants" (45 Fed. Reg. at 63042), and then adjudicate, to the extent disputed, the distribution of the royalties within the specific categories of programming. In the interests of efficiency, the Judges could address any disputes over the validity or categorization of claims concurrently with proceedings to allocate royalties among the categories.

Respectfully Submitted,

JOINT SPORTS CLAIMANTS

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2016, a copy of the foregoing Responsive Brief of the Joint Sports Claimants was sent by Federal Express Standard Overnight mail to the individuals listed below.

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Exhibit A

Before The
COPYRIGHT ROYALTY TRIBUNAL
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In the Matter of	)
	)
Distribution of Cable Royalty Fees	)

BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., ITS MEMBER COMPANIES, AND OTHER PROGRAM PRODUCERS AND DISTRIBUTORS ON THE ISSUE OF CATEGORIES OF CLAIMANTS NOT FULLY REPRESENTED

In response to the "Cable Distribution Schedule of Proceedings" issued May 7, 1980, by the Copyright Royalty Tribunal (Tribunal), the Motion Picture Association of America, Inc., its member companies, and other companies engaged in the production and/or distribution of programming exhibited by television broadcast stations,[1/] submit their brief "on the legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligible claimants" (hereinafter "unclaimed fund").

At the very outset it is important to recognize that consideration of alternative bases of allocation of the unclaimed fund arises only after a decision as to the allocable shares of groups of claimants in Phase I of this proceeding. Having made that determination the Tribunal would then be in a position to determine in Phase II the bases for allocation and distribution

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1/ The member companies and other program producer/distributor companies are listed in Attachment A.

of the cable royalty fund, including the unclaimed fund, to individual claimants.

The questions presented by the unclaimed fund permeate the showing of each category of claimants in this proceeding. Two possible bases exist for distribution of that fund: (1) distribution of the unclaimed fund in a particular category of claimants to the eligible claimants within the same category; or (2) apportionment and distribution of the total unclaimed fund in all categories among all eligible claimants on the basis of their individual entitlements to the entire claimed portion of the cable royalty fund.

1. Are Any Categories Fully Represented?

Before addressing these alternative bases for distribution of the unclaimed fund it is important to address first the continuing refrain of Joint Sports and Music claimants in this proceeding that they represent 100% of all eligible claimants in their respective categories, while others represent less than 100%. This claim is not supported by the record and the facts show that neither category represents 100% of the eligible claimants. Indeed Music interests face the threshhold question as to whether any eligible claimants are before the Tribunal.

ASCAP's "Filing of Claims to Cable Royalty Fees" (dated July 24, 1978) states: "The claim is filed on behalf of all ASCAP members, pursuant to their membership agreements with ASCAP." (Emphasis added.) This indicates clearly that the basis for the claim is the membership agreement, but no showing has been proferred that the membership agreement authorizes ASCAP to represent its

members in filing claims before the Copyright Royalty Tribunal.[2/]

Assuming arguendo that ASCAP, SESAC, and BMI can be considered as the proper parties to file claims for cable license fees under the Act, the record shows that 100% of the individual claimants will not receive distribution even though music is basing its present claim on 100% of music used in distant signal carriage. This results from a continuing situation in which members whose works are used, thereby entitling them to distribution, cannot be found. ASCAP's counsel testified as to the situation:

> MR. KORMAN: I might comment ASCAP, the performing rights, are the only people in this room who deal regularly with this problem. ASCAP runs into a situation frequently where there is no member share.
>
> We have older works. You would have a composer or estate of a composer as a member, but the author has disappeared. He is nowhere to be found. His descendants are not known, and the work is performed. The composer does not get the lyric writer's share earned by those performances nor [does] the publisher.
>
> That goes into a pot and is shared by all members. (3/31/80 Transcript, pp. 60-61).

The fact that these members cannot be found, regardless of the reasons, means that a certain portion of otherwise eligible music

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2/ The "Amended Consent Judgment," Civil Action No. 13-95, entered March 14, 1950, in United States of America v. American Society of Composers, Authors and Publishers, et al., provides in part as follows:

> IV. Defendant ASCAP is hereby enjoined and restrained from:
>
> (A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis.

claimants will not share in the distribution of the cable royalty fund, with the direct result that the remaining members' share will be increased proportionately. This has the same effect as allocating to any group or category of claimants a share of the cable royalty fund on the basis of 100% representation when in fact less than 100% of the eligible claimants will share in the proceeds. The Tribunal, if it determines ASCAP, SESAC, and BMI have technically met the filing requirements, must look to the practical aspects of how music's share will be distributed.

The disparity between 100% of the music claimed and distribution among less than 100% of eligible claimants results in a claim by Music of a larger share of the cable royalty fund than could be justified by individual claims. In view of this effect, the Tribunal should find that the music category does not fully represent its total number of eligible claimants.

The Joint Sports Claimants argued in their Pretrial Memorandum (dated January 31, 1980), that "No claimant is entitled to royalties simply on the basis of an assertion that it is associated in some way with some amorphous class of programming ..." (p. 8). Rather, they argued individual claims must be substantiated before a claim would be allowed. Because Joint Sports Claimants assertedly could justify 100% of their claims for baseball, basketball, hockey, and soccer, they apparently felt that they represent fully -- or, at least, share in the proceeds resulting from -- the entire spectrum of sports programming shown

by distant signal carriage.

The transparency of this claim is evident. Distant signal carriage of sports is not limited to men's professional baseball, basketball, hockey, and soccer, as is implicitly suggested by Joint Sports Claimants, but includes carriage of other sports, e.g., tennis, wrestling, water skiing, motorcross, collegiate sports, golf, boxing, gymnastics, women's professional basketball, high school basketball, and harness racing. (Joint Sports Claimants, Direct Testimony of Bowen and Lemieux, Exhibit D.) All these were apparently used as part of the "amorphous" grouping called sports for purposes of Joint Sports Claimants' distribution proposal even though not all owners of these programs had filed to obtain compulsory license fees.[3/] Again, the practical effect will be to base the share on 100% participation when this is not justified by aggregation of actual individual claims nor by the final distribution of sports' share.

Program Syndicators do not dispute that less than all program owners who would fall in their category have filed claims. It is apparent that the category of broadcasting does not fully represent all eligibile claimants.

Thus it must be concluded that no category fully represents its total number of eligible claimants. Because this situation

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3/ While it appears collegiate sports will attempt to obtain some portion of the sports share, this will still not result in the sports share being distributed to 100% of eligible sports claimants.

occurs within each category before the Tribunal, whatever treatment is required should be applied uniformly. Should the Tribunal believe special treatment be afforded the unclaimed fund, Program Syndicators submit that the best treatment would be to establish each category's share to the cable royalty fund on the basis that they all represent 100% of eligible claimants. This would enable the major question in this proceeding to be decided on a consistent basis vis-a-vis each category. The unclaimed fund should then be segregated by determining what portion of total programming on distant signal carriage was not claimed by an eligible claimant; this would then be distributed in an entirely separate process.

This methodology is reasonable and appropriate because it permits the allocation among categories to be made in a relatively straightforward manner which lends itself to continuing application. Each category can be assumed to represent fully all eligible claimants for purpose of determining the allocable shares for all groups of claimants. This approach also avoids the difficult adjustments that would be required to account for unclaimed amounts prior to an allocation formula being determined. Furthermore, if the allocation is based on full representation, it will provide a better guide for future determinations on distribution shares.

2. How Should The Unclaimed Fund Be Distributed?

Assuming that an unclaimed fund should and can be determined, two possible methods of distribution are open to the Tribunal.

First, and the preferred method in our opinion, those portions of the unclaimed fund relating to a particular category should be distributed to the eligible claimants within the same category. This method recognizes that those most closely identified with the type of programming generating compulsory license fees should receive the benefits so as to stimulate and to promote production and development of programming in proportion to its use by cable systems and benefit to the viewing public. A second method of distribution would be to allocate the unclaimed fund on the basis of each individual claimant's pro rata share of the cable royalty fund.

We believe that the first method is preferred for the following reasons. Perhaps the closest analogy to the legal issues raised by the distribution of the unclaimed portion of the cable royalty fund is the distribution of damages in a class action suit. Under Rule 23 of the Federal Rules of Civil Procedure, once the appropriate class has been determined, the court may require that class members "opt in" to any claim for damages by submitting individual notice of his or her damages. E.g., Sledge v. J. P. Stevens Co., Inc., 585 F.2d 625, 652 (4th Cir. 1978).

The "opting in" procedure under Rule 23 encompasses many of the procedures contained in the Copyright Act of 1976 and the regulations thereunder for filing to receive a portion of the compulsory license fees. Each requires the possible claimants to file a claim by a date certain and thereby cut-off further

claims to possible awards. See Robinson v. Union Carbide Corp., 544 F.2d 1258, 1264 (5th Cir. 1977) (Judge Wisdom, concurring opinion.)

In two class action settlements where a settlement fund was established prior to final resolution of the size of the classes or their respective claims, the courts upheld redistribution of the fund within the same classes when the actual liability was substantially lower than originally anticipated. In Beecher v. Able, 575 F.2d 1010 (2nd Cir. 1978), the court redistributed an established settlement fund which was approximately quadruple the size of the actual claims within the framework of the classes originally set on the basis of the type of securities owned. The Second Circuit upheld this redistribution on the basis that the court acted within its "duty to insure equitable allocation of the proceeds of the settlement." 575 F.2d at 1016; see also Zients v. LaMorte, 459 F.2d 678 (2nd Cir. 1972).

In the Antibiotics Antitrust Litigation the claims of individual consumers were considered to be a sub-class within the larger class of governmental entities. When it was determined that the actual claims of individual consumers were considerably less than the amount apportioned to them as a sub-class, the unclaimed amount was allowed to revert to the class of governmental entities of which they were a part, instead of being made available for distribution among all classes. State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D. N.Y. 1970); aff'd, 440 F.2d 1079 (2nd Cir. 1971). The Second Circuit assumed

the propriety of keeping the fund within the same class and indicated that this was the best way to maximize the benefits to the overall class, including the subclass, as opposed to transferring all or a portion of this amount to a different class, as was argued should be done. 440 F.2d at 1091.

The lesson of these cases is that the Tribunal should focus on the proper distribution between categories as if they represented fully all eligible claimants. The first concern of the courts in the above-cited cases was that the settlement amount represented a reasonable resolution for the entire matter. That individual shares turned out to be different within this broader resolution was less important because the courts were not looking for individual resolution. The value of grouping individual parties is that each claim does not have to be resolved separately, but that they can be resolved as a group.

That individuals within the category may get larger shares than they would if others had filed should be of minimal concern where, as here, it will not result in dramatic increases in shares. The essential character of this proceeding, division among categories, will be maintained; future hearings on the same matter can look for some guidance to the allocation among categories used here, rather than starting afresh with different mixtures of individual claimants each year. For these reasons, Program Syndicators believe that the allocation of the entire cable royalty fund should be made among categories of eligible claimants with a specific category dividing among themselves.

As set forth above the alternative method would be to view the unclaimed fund as a separate pot which should be shared on the basis of each claimant's proportionate share of the claimed cable royalty fund. Individual shares in the unclaimed fund would be determined by comparing the amount received by an eligible claimant to the total claimed fund. This factor would then be multiplied by the unclaimed fund to determine the amount going to that individual claimant. This would divide the unclaimed fund equitably among all eligible climants in the same proportion as each received from the claimed cable royalty fund. Under this alternative a proportionate sharing of the unclaimed fund is essential to an equitable distribution. Weighting the share to the unclaimed fund on the same basis as the Tribunal uses for the primary distribution would provide a consistent basis for determining overall distribution.[4/]

For the reasons stated, Program Syndicators urge the Tribunal to determine in Phase I of this proceeding the share allocable to each group of claimants. Two alternatives are available for allocation and distribution of the unclaimed fund. The preferred method would be to permit the amount of the unclaimed fund relating to a specific category to remain within that category for distribution to eligible claimants therein. An alternative method would

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4/ The ASCAP/SESAC boost of 25% for claimants who did not file has no relationship to reality. Its obvious flaw is that while in the small (albeit, inflated) share ASCAP/SESAC claims, the 25% boost does not appear significant, if applied to all categories it will mean a percentage share for all categories totalling well over 100%.

be to segregate the entire unclaimed fund for distribution among all eligible claimants on the basis of their individual shares to the claimed cable royalty fund.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF
AMERICA, INC.
ITS MEMBER COMPANIES
OTHER PROGRAM PRODUCERS AND
DISTRIBUTORS

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_____
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May 23, 1980

Exhibit B

Before The
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20036

In the Matter of	)	
	)	
Cable Royalty	)	Docket No. 79-1
Distribution Proceeding	)	

OPPOSITION TO MOTION TO STRIKE

The Motion Picture Association of America, Inc., its member companies, and other companies engaged in the production and/or distribution of movies and series programs exhibited by television broadcast stations ("Program Syndicators") hereby oppose the Motion to Strike filed with the Tribunal on July 1, 1980, by the American Society of Composers, Authors and Publishers ("ASCAP").

1. On May 7, 1980, the Tribunal issued its Order containing the following directive:

> 2. On May 23 interested parties shall submit a brief on the legal issues applying to the situation of those categories of claimants not fully represented by its total number of eligible claimants.

2. On May 23, 1980, the date specified by the Tribunal, Program Syndicators filed its "Brief on the Issue of Categories of Claimants Not Fully Represented." In that brief it was asserted that ASCAP, BMI, and SESAC have not been authorized to file claims on behalf of music interests, and thus that there are no eligible music claimants before the Tribunal. The Program

Syndicators' contention was made in the context of ASCAP's repeated, unsupported assertion that 100% of the eligible claimants in the music category have properly filed claims for royalties, and that thus music is unique in this regard.

3. ASCAP was careful to point out that its motion "is not directed to the merits," but instead was based on the asserted ground that the Program Syndicators' position should be stricken as "late." While the Program Syndicators fully appreciate ASCAP's reluctance to address the merits of our contention, ASCAP's procedural objections are totally unfounded. ASCAP's convoluted argument ignores the fact that Program Syndicators were responding directly to the Tribunal's May 7, 1980, Order. Additionally, Program Syndicators' legal contentions regarding the propriety of music's representation by ASCAP, BMI, and SESAC in the filing of claims, have absolutely nothing to do with the Syndicators' own royalty claims; thus the paragraph quoted by ASCAP from the May 7 Order pertaining to "testimony by claimants in justification of their claim on the basis of any theory or evidence excluded from presentation during Phase I ..." clearly is inapplicable to the legal matter raised by Program Syndicators.

4. Further, the question of whether a category of claimants is fully represented is clearly a Phase II, not a Phase I, matter. In Phase I, a share is to be allocated to music, as well as to every other major claimant group, regardless of what percentage of that group's eligible copyright owners have properly filed claims for royalties. Thus, as is evident from Program Syndicators' Findings and Conclusions filed July 7, 1980, a specific share should be

allocated to music in Phase I regardless of whether all the music copyright owners have filed claims or not, just as a specific share should be allocated to all other claimants whether or not all eligible owners in that group have filed. It is only later, in Phase II, that it will be determined how many eligible copyright owners within each group have filed claims, and how these unclaimed funds should be distributed. Because these issues are totally irrelevant to Phase I, it is ludicrous for ASCAP to suggest that some sort of "direct case" on these questions should have been presented during Phase I. For all these reasons, ASCAP's Motion to Strike should be denied.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF
AMERICA, INC.
ITS MEMBER COMPANIES
OTHER PRODUCERS AND DISTRIBUTORS

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